

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





ORIGINAL

# 75-7076-7

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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DOCKET No. 75-7076

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THE ROBERT STIGWOOD GROUP LIMITED, LEEDS MUSIC  
LIMITED and LEEDS MUSIC CORPORATION,  
*Plaintiffs-Appellants-  
Cross-Appellees,*

v.

JOHN T. O'REILLY, JACK COYNE and ROBERT CASSIDY,  
*Defendants-Appellees-  
Cross-Appellants.*

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DOCKET No. 75-7077

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TRACK MUSIC, INC., FABULOUS MUSIC LTD.  
and NEW IKON, LTD.,  
*Plaintiffs-Appellants-  
Cross-Appellees,*

v.

CONTEMPORARY MISSION, INC., JOHN T. O'REILLY, JACK  
COYNE, PATRICK BERKERY and RICHARD PALMESE,  
*Defendants-Appellees-  
Cross-Appellants.*

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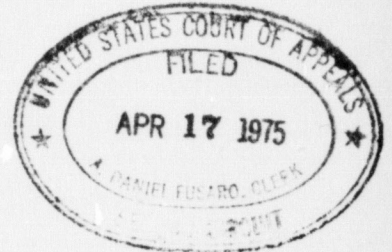
**PLAINTIFFS-APPELLANTS-CROSS-APPELLEES' BRIEF**

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LEEDS MUSIC LIMITED and LEEDS MUSIC CORPORATION,  
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v.

CONTEMPORARY MISSION, INC., JOHN T. O'REILLY,  
JACK COYNE, PATRICK BERKERY and RICHARD PALMESE,

Defendants-Appellees-Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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PLAINTIFFS-APPELLANTS-CROSS-APPELLEES' BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. In an action for copyright infringement, when the Court awards statutory damages pursuant to Section 101(b) of the Copyright Act (17 U.S.C. § 101 (b)), must the award amount to at least the specified statutory minimum sum of \$250 for each infringement of each separate copyrighted work?

2. Is a copyright infringer liable under United States copyright law for acts committed in the United States in preparation for infringements completed in a foreign country?

PRELIMINARY STATEMENT

The consolidated appeals are from two amended final judgments entered in the United States District Court for the District of Connecticut, pursuant to rulings of the Honorable Robert C. Zampano.

Appeal 75-7076 involves the rock opera entitled, "JESUS CHRIST SUPERSTAR" (hereinafter referred to as "Superstar" and the "Superstar Action"). Final judgment was entered upon the rulings of the court below on plaintiffs' motion for summary judgment. Plaintiffs thereupon moved for reconsideration of the rulings and amendment of the final judgment. An amended final judgment was entered

upon the rulings of the court below denying, in part, plaintiffs' motion for reconsideration and amendment of the final judgment. All rulings of the court below are unreported.

Appeal 75-7077 involves the rock opera entitled, "TOMMY" (hereinafter referred to as "Tommy" and the "Tommy Action"). Final judgment was entered upon the rulings of the court below on plaintiffs' motion for summary judgment. Plaintiffs thereupon moved for reconsideration of the rulings and amendment of the final judgment. An amended final judgment was entered upon the rulings of the court below denying, in part, plaintiffs' motion for reconsideration and amendment of the final judgment. All rulings of the court below are unreported.

All references herein to the record in the Superstar Action are hereinafter designated "R.S.," and all references to the record in the Tommy Action are hereinafter designated "R.T."

#### PLAINTIFFS' STATEMENT OF THE CASES

##### Background

The consolidated appeals are the second set of appeals to this Court from determinations in the within actions by the Honorable Robert C. Zampano of the court below. The previous appeals involved defendants' appeals from the respective preliminary injunctions entered in the



court below after extensive evidentiary hearings, enjoining defendants from utilizing Superstar or Tommy, respectively, or any segment thereof, in unauthorized performances, and from utilizing the titles of the rock operas in any advertisements or publicity. The opinion of the court below granting the preliminary injunction in the Superstar Action is reported at 346 F.Supp. 376. The opinion of the court below granting the preliminary injunction in the Tommy Action is unreported. This Court affirmed the entry of the preliminary injunctions orally from the bench and by consolidated judgment, dated May 30, 1973. The judgment of this Court provides:

"ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed on the authority of Robert Stigwood Group Ltd. v. Sperber, 457 F.2d 50 (2nd Cir. 1972) and Robert Stigwood Group Ltd. v. Hurwitz, 462 F.2d 910 (2nd Cir. 1972). In addition, the argument that the performances fall within the religious works exemption of 17 U.S.C. § 104 is frivolous."

#### SUPERSTAR ACTION - Nature Of The Case

Superstar is an opera form of a dramatico-musical work composed by Timothy Rice and Andrew Lloyd Webber; plaintiff Leeds Music Limited is the copyright proprietor of Superstar and all individual selections thereof, except "King Herod's Song;" plaintiff Leeds Music Corporation is possessed of the rights under the United States copyrights in Superstar and all individual selections thereof, except

"King Herod's Song;" and plaintiff The Robert Stigwood Group Limited is possessed of the United States rights to perform Superstar on the professional stage.

(App., 7 )

Plaintiffs sued defendants for infringement of the copyrights in Superstar by unauthorized public performances thereof, and for unfair competition arising out of the use of the titles "Jesus Christ Superstar" and "Superstar." (App., 4-10 ) The complaint identifies the six separate copyrights relied upon by plaintiffs as follows:

(1) "SUPERSTAR (From the Rock Opera 'Jesus Christ')," December 5, 1969, Class E, No. Eu 151211;

(2) "JOHN NINETEEN FORTY-ONE (From the Rock Opera 'Jesus Christ')," December 5, 1969, Class E, No. Eu 151212;

(3) "I DON'T KNOW HOW TO LOVE HIM (From the Rock Opera 'Jesus Christ')," October 30, 1970, Class E, No. Eu 219295;

(4) "JESUS CHRIST SUPERSTAR, A ROCK OPERA (Musical Excerpts Complete Libretto)," December 21, 1970, Class D, No. Dp 7618;

(5) "JESUS CHRIST SUPERSTAR, A ROCK OPERA (Libretto)," February 24, 1971, Class D, No. Df 2066 (Additional Words); and

(6) "JESUS CHRIST SUPERSTAR, (Vocal Score)," April 20, 1971, Class D, No. Du 79703. (App., 5, 6)

#### SUPERSTAR ACTION - Course Of Proceedings

Upon the institution of the action in the court below, plaintiffs' moved for a preliminary injunction.



After entry of a temporary restraining order, the court below held seven days of evidentiary hearings. On July 25, 1972, the court granted plaintiffs' motion for a preliminary injunction and filed its ruling thereon. The court below found in granting the preliminary injunction that "there is no question that the plaintiff Leeds Music Corporation, holds the United States copyrights for the opera JESUS CHRIST SUPERSTAR as a 'dramaticomusical composition,' and that the plaintiff Stigwood possesses the rights for the stage productions and dramatic presentations" (346 F.Supp. at 380); and that "the defendants have copied in wholesale fashion the lyrics and score, the sequence of songs, and the overall pattern of plaintiffs' rock opera; there is outright plagiarism here, pure and simple" (346 F.Supp. at 384).

By motion dated July 31, 1973, plaintiffs' moved for an order granting summary final judgment in their favor against defendants awarding plaintiffs (a) statutory damages in the total amount of \$90,000, pursuant to Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)); (b) the costs of the action, including a reasonable attorney's fee; and (c) a permanent injunction with the same injunctive relief as contained in the preliminary injunction entered against defendants. (App., 14) In the affidavit submitted in support of plaintiffs' motion for summary judgment, plaintiffs' stated that, "in order to avoid unnecessary further proceedings

herein, plaintiffs are prepared to accept the minimum statutory award of damages under the Copyright Act as the full extent of their damage recovery herein computed as follows: the sum of \$15,000 with respect to each separately copyrighted work, based upon the statutory minimum for sixty infringements thereof by the sixty separate performances, totaling the sum of \$90,000 to be awarded to plaintiffs, jointly and severally, against said defendants, jointly and severally." (App., 20, 21)

Plaintiffs' motion for summary judgment was argued on October 15, 1973. (App., 2) After more than a year of deliberation, the court concluded that the baseline figure for the computation of damages should be fifty performances based upon a finding that the defendants conceded "they performed the rock opera at least fifty times," and that twelve of the performances should be excluded therefrom because they took place in Canada. (App., 42, 44) The court below rejected as a matter of law defendants' contention that their successive performances constituted one infringing transaction for the purpose of assessing statutory damages, stating: "... it seems clear that each one of the defendants performances of the plaintiffs' rock opera constituted a separate infringing transaction. Among other factors, the fifty performances were given over a long period of time in many states as well as in Canada, pursuant to individually



negotiated contracts with owners of theatres, auditoriums and schools. At times, the tour consisted of different actors and the contents of the performances varied. Separate advertising was placed with local newspapers and radio stations for each event. In sum, each one of the defendants performances of the rock opera constituted a distinct, unrelated transaction; so, there were multiple infringements of the plaintiffs' work." (App., 43) The court further found that, "at each of the performances, there were six copyrights owned by the plaintiffs which the defendants willfully and unlawfully infringed." (App., 44) Nevertheless, the court, in applying Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)), concluded that, "an award should reflect 'such damages as to the court shall appear to be just'" and "it is the court's considered opinion that a fair, reasonable, and just award for damages shall be a total of \$22,800 for defendants' multiple infringements of plaintiffs' rock opera 'JESUS CHRIST SUPER-STAR.'" (App., 44) The court below rejected defendants' claims of good faith and reliance upon advice of counsel as a matter of law. (App., 41, 42)

Based upon its legal conclusions, the court ordered judgment for plaintiffs in the sum of \$22,800, together with costs and a reasonable attorney's fee, and judgment was entered thereon. (App., 45) No provision was made for permanent injunctive relief. (App., 45) Following the entry

of judgment, plaintiffs' moved for reconsideration of the court's rulings and amendment of the judgment on the grounds that the court below "overlooked so much of plaintiffs' motion for summary judgment as requested a permanent injunction with the same injunctive relief as contained in the preliminary injunction," and that the court below, "incorrectly applied the statutory measure of damages specified in Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)), which mandates that the court award the sum of \$250 for each separate infringement of each copyrighted work of plaintiffs, and the award of the sum of \$22,800 set forth in paragraph 1 of the judgment entered herein upon said rulings does not satisfy the statutory mandate." (App., 46) Upon reconsideration, the court below granted plaintiffs' request to amend the judgment by including permanent injunctive relief, but denied plaintiffs' request to increase the amount of damages. (App., 47) In denying the request to increase the amount of damages, the court below merely stated that, "under all the circumstances, the court is of the opinion that the sum awarded in this case is fair, reasonable and just," citing certain authorities. (App., 47) Plaintiffs thereupon filed their notice of appeal, "from so much of the amended final judgment entered" in the court below, "as limited plaintiffs' recovery of statutory damages to the sum of \$22,800 for thirty-eight separate infringements of six separately copy-



righted works, and denied so much of plaintiffs' motion to amend the judgment herein on November 15, 1974, to provide for an award of statutory damages in the minimum amount of \$250 for each infringement of each separately copyrighted work, pursuant to Section 101(b) of the Copyright Act (17 U.S.C. § 101(b))." (App., 49)

SUPERSTAR ACTION - Relevant Facts

Defendants' unauthorized uses of Superstar in concert performances were uniformly advertised as "Jesus Christ Superstar - The Most Moving Story Ever Told - Performed Live And In Concert By The International Rock Opera Company." (App., 18) Superstar is one of the most valuable and important contemporary copyrighted works. At the time of the institution of the action in the court below, a major authorized Broadway production of Superstar was playing at the Mark Hellinger Theatre in New York City; there were authorized United States touring companies presenting Superstar in concert form; and Universal Pictures was preparing a major authorized motion picture production thereof. By reason of the extreme value of Superstar, and to maximize the return on plaintiffs' investment therein, authorized public performances of Superstar were strictly limited. (R.S., Doc. 4, pp. 2, 3)

During the course of the evidentiary hearings on plaintiffs' application for a preliminary injunction, it was established that defendants performed Superstar on at least fifty-eight separate occasions. (App., 18) A confidential investigator's report identified two additional performances of Superstar by defendants. (App., 18) It was stipulated by the parties during the course of the evidentiary hearings, "that gross ticket sales for performances subsequent to December 1, 1971, amount to approximately \$300,000, and the amount therefrom received by the Contemporary Mission was approximately \$220,000." (App., 18) Defendant O'Reilly testified therein, "I would say that the net proceeds which went into the Contemporary Mission would be somewhere between sixty and sixty-five percent of the gross money that we received. And then the running expense, in other words, like salaries and things like that we paid out, came to approximately fifteen percent, and the other between, say, forty-five and fifty percent would be money directly going into the Contemporary Mission." (App., 18) It was established during the course of the evidentiary hearings that defendants and four others are the Contemporary Mission, Inc. (App., 18)

In support of their motion for summary judgment, plaintiffs relied upon defendants' listing of performances introduced in evidence during the evidentiary hearings in



connection with plaintiffs' application for a preliminary injunction to establish the number of infringing performances, together with the two additional performances revealed in the investigator's report. (App., 18) The requested statutory damages were based upon the product derived from multiplying the number of copyright infringements by the sum of \$250, the stated statutory minimum damage award. In support of plaintiffs' motion for summary judgment, plaintiffs filed a statement of facts as to which there was no genuine issue to be tried, pursuant to Local Rule 10(a)3 of the court below. Defendants failed to file a statement of material facts as to which they claimed there was a genuine issue to be tried as required by the Local Rule of the court below, and merely attempted to justify their infringements by a claim of good faith and reliance upon the advice of counsel. Defendants did not dispute that plaintiffs own and control the six copyrights in Superstar alleged in the verified complaint; that defendants copied in wholesale fashion the lyrics and score, the sequence of songs, and the overall pattern of Superstar for purposes of public performances; that defendants' performed Superstar on at least sixty separate occasions without any authorization, utilizing the copyrighted material protected by the six copyrights therein; that defendants were notified in writing of plaintiffs' claims of infringements of the copyrights in

Superstar by letter dated December 11, 1971, and defendants saw no reason to respond to the written notice of infringement claims, but thereafter persisted in their unauthorized performances; that each of defendants' performances was pursuant to a separately negotiated agreement with a specific auditorium and in conjunction therewith, they made separate arrangements for advertising with local newspapers and local radio stations; that the financial arrangements defendants made with numerous auditoriums varied in terms; that the contents of defendants' performances varied from time to time; that the performances were given over a period of several months at different auditoriums in such diverse locations as Connecticut, Maine, New Hampshire, Massachusetts, Delaware, Pennsylvania, Ohio, Virginia, Wisconsin, North Dakota, Iowa, Indiana, New York, Maryland, Rhode Island, Minnesota and Canada; and that gross ticket sales for the performances subsequent to December 1, 1971, amounted to approximately \$300,000 from which the defendants received approximately \$220,000, and paid out for expenses approximately \$33,000, leaving a net balance to defendants in excess of \$185,000. (App., 34, 35) For purposes of presenting the performances in Canada, defendants utilized the same cast and format developed in the United States, made arrangements for the performances in the United States, took the show to Canada for the performances, and brought their receipts back to the United States upon their return after the performances.



### TOMMY ACTION - Nature Of The Case

Tommy is an opera form of a dramatico-musical work composed by the members of a rock musical group collectively, professionally known as "The Who," and another. Plaintiff Track Music, Inc. is the copyright proprietor of the dramatic copyright in Tommy; plaintiffs Fabulous Music Ltd. and New Ikon, Ltd. are the respective copyright proprietors of the separate copyrights in the words and music of the twenty-six individual musical selections of which Tommy is comprised; and plaintiff Track Music, Inc. is possessed of the rights for the United States under the copyrights in the individual musical selections. (App.,54-58)

Upon discovery of defendants' uses of Tommy in two unauthorized performances, plaintiffs instituted suit in the court below for copyright infringements by unauthorized performances and for unfair competition arising out of the titles "TOMMY" and "The Rock Opera TOMMY." The complaint identifies the twenty-seven separate copyrights relied upon by plaintiffs as follows:

#### Plaintiff Track Music, Inc.

(1) "TOMMY," the dramatico-musical work, published July 31, 1969, Class D, No. Dp 7966, Oct. 20, 1971.

#### Plaintiff Fabulous Music Ltd.

(2) "TOMMY," from the rock opera, published July 31, 1969, Class E, Ep 291465, Aug. 4, 1969.

(3) "OVERTURE," from the rock opera, published July 31, 1969, Class E, Ep 261466, Aug. 4, 1969.

(4) "IT'S A LOY," from the rock opera, published July 31, 1969, Class E, Ep 261467, Aug. 4, 1969.

(5) "YOU DIDN'T HEAR IT (1921)," from the rock opera, published July 31, 1969, Class E, Ep 261468, Aug. 4, 1969.

(6) "AMAZING JOURNEY," from the rock opera, published July 31, 1969, Class E, Ep 261469, Aug. 4, 1969.

(7) "SPARKS," from the rock opera, published July 31, 1969, Class E, Ep 261470, Aug. 4, 1969.

(8) "CHRISTMAS," from the rock opera, published July 31, 1969, Class E, Ep 261471, Aug. 4, 1969.

(9) "THE ACID QUEEN," from the rock opera, published July 31, 1969, Class E, Ep 261473, Aug. 4, 1969.

(10) "UNDERTURE," from the rock opera, published July 31, 1969, Class E, Ep 261474, Aug. 4, 1969.

(11) "DO YOU THINK IT'S ALRIGHT?," from the rock opera, published July 31, 1969, Class E, Ep 261475, Aug. 4, 1969.

(12) "PINBALL WIZARD," from the rock opera, Class E, Eu 109526, Apr. 3, 1969.

(13) "PINBALL WIZARD," from the rock opera, published April 22, 1969, Class E, Ep 259150, Aug. 4, 1969.

(14) "THERE'S A DOCTOR (I'VE FOUND)," from the rock opera, published July 31, 1969, Class E, Ep 261477, Aug. 4, 1969.

(15) "GO TO THE MIRROR BOY," from the rock opera, published July 31, 1969, Class E, Ep 261478, Aug. 4, 1969.

(16) "TOMMY CAN YOU HEAR ME?," from the rock opera, published July 31, 1969, Class E, Ep 261479, Aug. 4, 1969.

(17) "SMASH THE MIRROR," from the rock opera, published July 31, 1969, Class E, Ep 261480, Aug. 4, 1969.



- (18) "SENSATION," from the rock opera, published July 31, 1969, Class E, Ep 261481, Aug. 4, 1969.
- (19) "MIRACLE CURE," from the rock opera, published July 31, 1969, Class E, Ep 261482, Aug. 4, 1969.
- (20) "SALLY SIMPSON," from the rock opera, published July 31, 1969, Class E, Ep 261483, Aug. 4, 1969.
- (21) "I'M FREE," from the rock opera, published July 31, 1969, Class E, Ep 261484, Aug. 4, 1969.
- (22) "WELCOME," from the rock opera, published July 31, 1969, Class E, Ep 261485, Aug. 4, 1969.
- (23) "WE'RE NOT GONNA TAKE IT," from the rock opera, published July 31, 1969, Class E, Ep 261487, Aug. 4, 1969.
- (24) "SEE ME, FEEL ME (Finale from 'WE'RE NOT GONNA TAKE IT')," from the rock opera, published October 21, 1970, Class E, Ep 279648, Nov. 16, 1970.

Plaintiff New Ikon, Ltd.

- (25) "COUSIN KEVIN," from the rock opera, published July 31, 1969, Class E, Ep 261472, Aug. 4, 1969.
- (26) "FIDDLE ABOUT," from the rock opera, published July 31, 1969, Class E, Ep 261476, Aug. 4, 1969.
- (27) "TOMMY'S HOLIDAY CAMP," from the rock opera, published July 31, 1969, Class E, Ep 261486, Aug. 4, 1969. (App., 55-58)

TOMMY ACTION - Course Of Proceedings

Upon the institution of the action in the court below, plaintiffs' moved for a preliminary injunction. On July 26, 1972, the court below granted plaintiffs' motion orally from the bench. In ruling thereon, the court stated that its rulings "are governed by my rulings in Superstar and I incorporate by reference thereto these rulings ..."  
(R.T., Vol. 1, Doc. 2, p.61) Defendants thereafter failed

to file any answer to the complaint. In August 1973, plaintiffs filed their motion for summary judgment awarding plaintiffs (a) statutory damages in the total amount of \$13,500, pursuant to Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)), (b) costs of the action, including a reasonable attorney's fee, and (c) a permanent injunction with the same injunctive relief as contained in the preliminary injunction entered against defendants. (App., 64) In the affidavit submitted in support of their motion for summary judgment, plaintiffs' stated that "in order to avoid unnecessary further proceedings herein, plaintiffs are prepared to accept the minimum statutory award of damages under the Copyright Act as the full extent of their damage recovery herein computed as follows: the sum of \$500 with respect to each separately copyrighted work, based upon the statutory minimum for two infringements thereof by the two separate performances, totaling the sum of \$13,500 to be awarded to plaintiffs, jointly and severally, against said defendants, jointly and severally." (App., 69)

Upon the hearing of argument on plaintiffs' motion for summary judgment on October 15, 1973, the court below reserved decision. Approximately two months thereafter, plaintiffs made an application for a pre-judgment remedy against defendant Contemporary Mission, Inc. in the form of an attachment. (App., 51) Upon oral argument of said motion, the court below reserved decision. (App., 51)



After more than a year of deliberation, the court below granted plaintiffs' motion for summary judgment and simultaneously denied plaintiffs' application for a pre-judgment remedy as moot.

In ruling on plaintiffs' motion for summary judgment, the court below found that plaintiffs are the owners of twenty-seven copyrights in Tommy; that in June 1972, defendants sought a license to perform Tommy which request was denied; that defendants were notified in writing of plaintiffs' infringements claims by telegram in early July 1972, and thereafter defendants performed Tommy on July 15, 1972, at Richmond, Virginia, and on July 17, 1972, at Roanoke, Virginia, without authorization; that in defendants' performances, defendants copied verbatim the lyrics and score, the sequence of songs, and the overall pattern of plaintiffs' rock opera; that each performance was conducted pursuant to a separately negotiated contract with the owners of the theatre in question; that local advertising was utilized in both locations; and that each infringing performance was an unrelated, distinct business transaction. (App., 75, 76) The court below rejected defendants' claim of reliance upon advice of counsel as a matter of law, for the reasons set forth in its ruling on plaintiffs' motion for summary judgment in the Superstar Action. (App., 76) Notwithstanding the foregoing, the court below said

that "it is the court's considered opinion that a fair, reasonable, and just award for damages shall be a total of \$2,700 for defendants multiple infringements of plaintiffs' rock opera TOMMY." (App., 76) The court below also awarded plaintiffs costs and an attorney's fee, but failed to award permanent injunctive relief.

Following the entry of judgment, plaintiffs' moved in the court below for reconsideration of the ruling on plaintiffs' motion for summary judgment and amendment of the judgment on the grounds that the court overlooked so much of plaintiffs' motion for summary judgment as requested a permanent injunction, and that the court incorrectly applied the statutory measure of damages specified in Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)), which mandates that the court award the sum of \$250 for each separate infringement of each copyrighted work of plaintiffs. (App., 78, 79) On reconsideration, the court below granted permanent injunctive relief, but denied plaintiffs' request to increase the amount of damages for the reason that "under all the circumstances, the court is of the opinion that the sum awarded in this case is fair, reasonable, and just," citing certain authorities. (App., 80) Plaintiffs thereupon filed their notice of appeal "from so much of the amended final judgment entered" in the court below "as limited plaintiffs' recovery of statutory damages



to the sum of \$2,700 for two separate infringements of 27 separately copyrighted works and denied so much of plaintiffs' motion to amend the judgment entered herein on November 26, 1974, to provide for an award of statutory damages in the minimum amount of \$250 for each infringement of each separately copyrighted work pursuant to Section 101(b) of the Copyright Act (17 U.S.C. § 101(b))." (App., 82)

#### TOMMY ACTION - Relevant Facts

Defendants presented two unauthorized performances of Tommy, billed as a rock opera doubleheader consisting of "Live And In Concert, Jesus Christ Superstar, A Rock Opera, Plus The Rock Opera, 'TOMMY.'" Defendants presented Tommy at the Richmond Mosque, Richmond, Virginia, on July 15, 1972, and at the Roanoke Civic Center Auditorium, Roanoke, Virginia, on July 17, 1972. (App., 68)

Tommy is the first rock opera recognized as a form of opera by the critics. It has been the subject of a vast amount of publicity and feature reporting in virtually all national magazines and major newspapers in the United States. (R.T., Doc. 6, p. 2) The full-length recording of a rendition of Tommy by "The Who" on the Decca label, was highly praised as a masterpiece of creative success, and more than two million copies of the recording were sold

in the United States. "The Who" presented numerous public performances of Tommy throughout the world, including at major opera houses and auditoriums. (R.T., Doc. 6, pp. 2, 3) At the time this action was instituted, no stage productions were being authorized pursuant to a carefully supervised program of exploitation. (R.T., Doc. 6, pp. 3, 4)

Although defendants filed no answer to the complaint in the court below, they opposed plaintiffs' motion for summary judgment. In support of plaintiffs' motion for summary judgment, plaintiffs filed a statement of facts as to which there was no genuine issue to be tried pursuant to Local Rule 10(a)3 of the court below. (App., 73) Defendants failed to file a corresponding statement of material facts as to which they claimed there was a genuine issue to be tried. Defendants did not dispute that plaintiffs, respectively, own and control twenty-seven separate copyrights in Tommy and the rights thereunder, as alleged in the verified complaint; that defendants copied in wholesale fashion the lyrics and score, the sequence of songs, and the overall pattern of plaintiffs' rock opera for public performances thereof; that in June 1972, defendant O'Reilly requested a license to use Tommy, and was advised such license would not be granted, and the rights would not be available until after 1972; that defendants were notified in writing of plaintiffs'



infringement claims by telegram, dated July 13, 1972; that defendants' performed Tommy on July 15, 1972 at Richmond, Virginia, and on July 17, 1972, at Roanoke, Virginia, without any authorization; that defendants' performances were conducted pursuant to a separately negotiated agreement with the specific auditoriums and in conjunction therewith, made separate arrangements for local advertising. (App., 73) In the affidavit of defendant O'Reilly, submitted in opposition to plaintiffs' motion for summary judgment, he merely asserted that he relied upon the advice of counsel in proceeding with the performances and that the performances did not result in "any profit or surplus of funds." (App., 89)

## ARGUMENT

### POINT I

**THE COPYRIGHT ACT MANDATES  
THAT AN AWARD OF STATUTORY  
DAMAGES MUST NOT BE LESS  
THAN THE SUM OF \$250 FOR  
EACH INFRINGEMENT OF EACH  
COPYRIGHTED WORK**

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The statutory damage provision of the Copyright Act is set forth in subdivision (b) of Section 101 thereof (17 U.S.C. § 101(b)) (Reproduced in its entirety as "Appendix A" hereto). Section 101 provides in pertinent part:

"§ 101. INFRINGEMENT. - If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: ...

(b) DAMAGE AND PROFITS; AMOUNT; OTHER REMEDIES. To pay to the copyright proprietor ... in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of [unrelated exceptions omitted], and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty."

Shapiro, Bernstein & Co. v. 4636 S.Vermont Ave.,  
Inc., 367 F.2d 236 (9 Cir. 1966), at p. 240:

"... it is important to emphasize that the judicial discretion to be employed in choosing between proven profits and damages on the one hand and the statutory limits on the other only comes into play when profits and damages have actually been proved, and unless they have, the court must apply the statutory standard. *Westermann Co. v. Dispatch Co.*, 249 U.S. 100, 39 S.Ct. 194, 63 L.Ed. 499 (1919); *Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202, 51 S.Ct. 407, 75 L.Ed.



978 (1931); *Douglas v. Cunningham*, 294 U.S. 207, 55 S.Ct. 365 (1935). We do not believe that the references in *Woolworth*, supra, to the court's discretion in any way conflict with the rule stated in these three older cases. The *Woolworth* case merely held that the trial court has discretion to choose between actual damages and profits on the one hand and statutory damages on the other where actual damages and profits have been proved. Where such damages and profits have not been proved the statutory limits must be applied and the trial court's only discretion lies in determining the amount (between a minimum of \$250 and a maximum of \$5,000) per infringement to be awarded."

*Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202, 203, 206, 207 (1931), at p. 203:

"In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of \$250 set out in the so-called 'no other case' clause of Section 25(b) of the Copyright Act (17 U.S.C. Sec. 25), reading, 'and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty?'"

\* \* \* \*

at pp. 206, 207:

"We are of opinion that the maximum and minimum provisions were intended to be applicable alike to all types of infringement except those for which the section makes other specific provision."

*Westermann Co. v. Dispatch Co.*, 249 U.S. 100, 105, 106 (1919), at p. 105:

"The statute says that the liability thus defined is imposed for infringing 'the copyright in any' copyrighted 'work.' The words are in the singular, not the plural. Each copyright is treated as a distinct entity, and the infringement of it as a

distinct wrong to be redressed through the enforcement of this liability. Infringement of several copyrights is not put on the same level with infringement of one. On the contrary, the plain import of the statute is that this liability attaches in respect of each copyright that is infringed."

\* \* \* \*

at p. 106:

"The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than \$5,000 nor less than \$250, except that for a newspaper reproduction of a copyrighted photograph they shall not be more than \$200 nor less than \$50. In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum."

Douglas v. Cunningham, 294 U.S. 207 (1935), at

p. 210:

"In the Westermann and LaSalle cases it was held that not less than \$250 could be awarded for a single publication or performance. It follows that such an award, in the contemplation of the statute, is just."

Universal Statuary Corporation v. Gaines, 310 F.2d

647 (5 Cir. 1962), at pp. 647, 648:

"The appeal is from that part of the final judgment limiting the amount of damages to \$250, appellant contending that the District Court erred in failing and refusing to award



damages in an amount not less than \$250 nor more than \$5,000 for each of the thirteen separate and distinct copyrights which the court found to be infringed. The appeal is meritorious. The governing statute is clear."

\* \* \* \*

"The Supreme Court has so held in a multiple-copyright infringement case. *L.A. Westermann Company v. Dispatch Printing Company*, 1919, 249 U.S. 100, 73 S.Ct. 225, 97 L.Ed. 280, and has also held that the discretion of the trial court in assessing such damages as appear just is limited by the statutory minimum of \$250 and maximum of \$5,000. *Westermann, supra*; *Jewell-LaSalle Realty Company v. Buck*, 1931, 283 U.S. 202, 73 S.Ct. 226, 97 L.Ed. 281; *Douglas v. Cunningham*, 1935, 294 U.S. 207, 73 S.Ct. 224, 97 L.Ed. 280; and *F.W. Woolworth Company v. Contemporary Arts, Inc.*, 1952, 344 U.S. 228, 73 S.Ct. 222, 97 L.Ed. 276."

*Wihtol v. Crow*, 309 F.2d 777, 781, 782 (8 Cir.

1962), at p. 781:

"Crow's new arrangement of the song included the music and lyrics of the 1935 version as copyrighted. The arrangement also included the plaintiffs' 1944 copyrighted version, which contained changes in the music and an addition to the lyrics of the 1935 version. Under the Copyright Act, 17 U.S.C. § 7, each version of the song is covered by a separate valid copyright."

\* \* \* \*

"From a practical standpoint, it would seem that Crow, who copies only one song, should be held liable for only one infringement. We have, however, reluctantly concluded that, under the language of the Copyright Act, his copying must be held to have infringed both of the copyrights of the plaintiffs."

\* \* \* \*

at p. 782:

"In lieu of actual damages, the damages allowed may be such 'as to the court shall appear to be just,' but must be within statutory limits (17 U.S.C. § 101). L.A. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100, 106-107, 39 S.Ct. 194, 63 L.Ed. 499; Jewell-LaSalle Realty Co. v. Buck, 283 U.S. 202, 51 S.Ct. 407, 75 L.Ed. 978; and the cases cited in Edwin H. Morris & Company, Inc. v. Burton (D.C.E.D. La.), 201 F.Supp. 36, at page 39."

Buck v. Bilkie, 63 F.2d 447 (9 Cir. 1933):

"In the absence of proof of actual damages, an award of at least \$250 damages is mandatory. Jewell-LaSalle Realty Co. v. Buck, 283 U.S. 202, 51 S.Ct. 407, 75 L.Ed. 978, construing 17 U.S.C. § 25(b), 17 U.S.C.A. § 25(b), the Copyright Act § 25(b)."

Baccaro v. Pisa, 252 F.Supp. 900 (S.D.N.Y. 1966),

at p. 904:

fn. 10:

"Of course, so long as a single act infringed two copyrights protecting two separate musical compositions, for purposes of computing the damages two 'infringements' would occur."

\* \* \* \*

fn. 12:

"Both copyrights were separately infringed by the five AM broadcasts on September 8, 1960, February 20, March 23, April 18, and May 29, 1961, a total of ten 'infringements.' Both copyrights were separately infringed by the FM broadcast on August 3, 1961; but only one was infringed by the AM broadcast of September 1, 1961, because 'Parlami D'Amore Mariu' was no longer protected by the copyright law. The final six 'infringements' of 'Dicitencello Vuie,' the only remaining protected composition, took place by the simultaneous AM and



FM broadcasts of October 3, November 1, December 7, 1961; and January 5, February 6, and March 7, 1962."

\* \* \* \*

"It may be readily concluded that each playing of a copyrighted composition was a separate taking of plaintiff's property for purpose of § 101(b). This is a case where the treatment of 'each stick in a faggot [as] a single [infringement] unit' is manifestly proper. Cf. Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955). Computing the loss in this fashion, the damages in the case at bar amount to \$4,750, the \$250 minimum multiplied by each of the 19 infringements."

As the court said in the JESUS CHRIST SUPERSTAR case, entitled, The Robert Stigwood Group Limited v. Miami Jai-Alai, Inc., S.D. Fla., 71-1772 Civ.-JLK, unreported Findings of Fact, Conclusions of Law and Final Judgment dated June 30, 1972, a copy of which is annexed hereto and marked "Appendix B," wherein only five of the six copyrighted works therein were utilized for the infringing performances, at pp. 5, 6:

"In addition to such profits Defendants are jointly and severally liable to Plaintiffs The Robert Stigwood Group Limited, Leeds Music Limited and Leeds Music Corporation for minimum statutory damages in the total amount of \$21,250, arising out of the infringement of each of said five copyrighted musical works at each of Defendants 17 public performances, as provided in § 101(b) of the Copyright Act (17 U.S.C. § 101(b)), representing \$250 for the infringement of each copyrighted musical work at each public performance."

7 For purposes of use in connection with each of the aforesaid per-

The court below relied upon two authorities to support an award of less than the mandated statutory minimum. (App., 47, 80) Its reliance on Shapiro, Bernstein & Co. v. Bleeker, 224 F.Supp. 595 (S.D. Calif. 1963), was clearly misplaced. The District Court's conclusion therein that it was not bound to award the mandated statutory minimum in the absence of proof of profits and actual damages was overruled on appeal, sub. nom. Shapiro, Bernstein & Co. v. 4636 S. Vermont Ave., Inc., quoted supra, p. 22. The other authority, Advertisers Exchange v. Hinkley, 199 F.2d 313 (8th Cir. 1952), cert. den. 344 U.S. 921 (1953), to the extent it could be construed as suggesting a contrary rule, was clearly overruled by Wihtol v. Crow, quoted supra, p. 25. Furthermore, unlike Advertisers Exchange v. Hinkley, the Superstar and the Tommy Actions were not an "attempt on the part of counsel to magnify and inflate plaintiff's 'in lieu' damages to an unconscionable great sum of money 'by splitting' the bill of complaint in the case up into 29 counts" when all that "was involved in the infringement was use of matter that had been obtained from plaintiff in one transaction for use at \$156 a year." (199 F.2d at 316)



## POINT II

THE COURT BELOW ERRED IN  
FAILING TO AWARD PLAIN-  
TIFFS MINIMUM STATUTORY  
DAMAGES IN THE AMOUNT OF  
\$250 FOR EACH INFRINGEMENT  
OF EACH COPYRIGHTED WORK

In the Superstar Action, the court below found that "each one of defendants' performances of the plaintiffs' rock opera constituted a separate infringing transaction" (App., 43); and that "At each of the performances, there were six copyrights owned by the plaintiffs which the defendants willfully and unlawfully infringed" (App., 44). The court below ignored the uncontroverted evidence of sixty separate performances and adopted the "baseline figure" of fifty performances (App., 42). This baseline figure was reduced by the court below to thirty-eight by excluding twelve Canadian performances (App., 44). As a result, the award of statutory damages in the amount of \$22,800 was for 228 separate infringements (thirty-eight performances of each of the six separate copyrights) and amounts to \$100 for each separate infringement. The award of statutory damages, therefore, fails to meet the statutory mandate of a minimum of \$250 for each separate infringement.

In the Tommy Action, the court below found that "Each of the defendants' two performances of the rock opera ... constituted willful infringements of the plaintiffs' copyrights" (App., 76); and that "Plaintiffs are the owners

of at least twenty-seven copyrights in the rock opera ..."  
(App., 76). As a result, the award of statutory damages in  
the amount of \$2,700 was for 54 separate infringements (two  
performances of each of the twenty-seven separate copyrights)  
and amounts to \$50 for each separate infringement. The  
award of statutory damages, therefore, fails to meet the  
statutory mandate of a minimum of \$250 for each separate  
infringement.

In both actions, the court below in its original  
rulings (App., 44, 76), and upon reconsideration (App., 47,  
80) assumed that it was within the discretion of the court  
to award less than the statutory minimum, stating that the  
sum awarded was considered to be "fair, reasonable and just."  
The award of statutory damages should be increased to meet  
the mandated statutory minimum set forth in Section 101(b)  
of the Copyright Act (17 U.S.C. § 101(b)).

(a) THE COURT BELOW WRONGFULLY REDUCED THE NUMBER OF  
INFRINGING PERFORMANCES IN THE SUPERSTAR ACTION

The court below found the defendants "concede  
that they performed [Superstar] at least fifty times"  
(App., 42). The only affidavit submitted in opposition to  
plaintiffs' motion does not even attempt to contradict  
plaintiffs' evidence of sixty performances (App., 36), and  
the record is devoid of any contradiction thereof.

In addition, the court below erred in excluding  
the twelve performances in Canada. It was undisputed that



in each instance the performances were by defendants who assembled and arranged in the United States all of the necessary elements for the performances in Canada, and then travelled to Canada to complete the performances. Defendants should be made to respond in damages for their acts in the United States which constituted an integral part of the Canadian performances.

As this Court said in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 52 (1939), aff'd 309 U.S. 390 (1940), wherein the infringer shipped negatives of an infringing motion picture abroad for reproduction and exhibition:

at p. 52:

"The Culver Company made the negatives in this country, or had them made here, and shipped them abroad, where the positives were produced and exhibited. The negatives were 'records' from which the work could be 'reproduced,' and it was a tort to make them in this country. The plaintiffs acquired an equitable interest in them as soon as they were made, which attached to any profits from their exploitation, whether in the form of money remitted to the United States, or of increase in the value of shares of foreign companies held by the defendants."

Similarly, in *Famous Music Corp. v. Seeco Records, Inc.*, 201 F.Supp. 560, 569 (S.D.N.Y. 1961), wherein tape recordings of musical works were shipped to foreign countries for use in the manufacture of recordings and plaintiffs were awarded statutory damages therefor, the court said:

at p. 569:

"A holding in Capitol Records v. Mercury Records Corporation, 2 Cir., 1955, 221 F.2d 657, that a copyright has no extra-territorial effect, does not solve this problem of manufacture since plaintiffs seek to hold defendant for what it did here rather than what it did abroad. Accordingly, this court holds that the act of defendant in preparing the tape was a part of the manufacture and, consequently, an infringement for which it should respond under Section 101(e)."

The reliance of the court below on Nimmer, Copyright, § 65.61 and § 156, and American Code Co. v. Bensinger, 282 Fed. 829, 833 (2nd Cir. 1922), is misplaced. As stated in Nimmer, Copyright, § 65.61 at p. 264, the general rule that copyright laws have no extraterritorial effect "... requires some qualification. If and to the extent a part of the 'act' of infringement occurs within the United States, then although such act is completed in a foreign jurisdiction, those parties who contributed to the act within the United States may be rendered liable under domestic copyright law," citing Famous Music Corp. v. Seeco Records, Inc., *supra*.

(b) UNDER NO CIRCUMSTANCES WERE THE AWARDS OF STATUTORY DAMAGES FAIR, REASONABLE AND JUST

In both actions, plaintiffs stated to the court that, "In order to avoid unnecessary further proceedings herein, plaintiffs are prepared to accept the minimum statutory award of damages under the Copyright Act as the full extent of



their damage recovery herein computed as follows, and specifying \$90,000 in the Superstar Action and \$13,500 in the Tommy Action. (App., 20, 69) The court below read that as a consent to accept an award of statutory damages in a fractional amount thereof, "in lieu of actual damages and profits" to which plaintiffs were otherwise entitled under the Copyright Act. The determination of the court below is particularly harsh in light of the testimony of defendant O'Reilly, that defendants' Superstar performances grossed approximately \$300,000, and in excess of \$100,000 after expenses, went directly into defendants' coffers. In the Tommy Action, the award of the court below did not even reach the sum of \$250 for each copyrighted work.

As this Court said in the leading Superstar action, *The Robert Stigwood Group Limited v. Sperber* 457 F.2d 50 (1972), at p. 51:

"The role of the courts must be to prevent exploitation of the opera in a manner that infringes the rights of the creators of the work and their assignees."

The court below found defendants to be willful infringers. No mitigating circumstances were referred to by the court below to justify its conclusion that the amount of damages awarded was fair, reasonable and just. To the contrary, in addition to being in disregard of the mandated statutory minimum, the amounts awarded are contrary to the

statutory rule of liability which, "formulated after long experience, not merely compels restitution of profit and reparation for injury, but also is designed to discourage wrongful conduct." (F.W. Woolworth Co. v. Contemporary Arts, 344 U.S. 228, 233 (1952).) An award of statutory damages which permits willful infringers to appropriate literary property not available for general licensing, skim hundreds of thousands of dollars off the copyright owners' potential market and retain substantial profits from their infringing acts is not designed to discourage wrongful conduct, but rather to render the Copyright Act impotent.



CONCLUSION

It is respectfully submitted that the respective amended final judgments should be further amended  
(a) to award to plaintiffs in the Superstar Action total statutory damages in the amount of \$90,000, consisting of the sum of \$250 for each infringement of each copyrighted work, and (b) to award to plaintiffs in the Tommy Action total statutory damages in the amount of \$13,500, consisting of the sum of \$250 for each infringement of each copyrighted work.

Respectfully submitted,

ABELES CLARK AND OSTERBERG  
Attorneys for  
Plaintiffs-Appellants-Cross-Appellees

ROBERT C. OSTERBERG  
JOHN L. EASTMAN  
INA LEA MEIBACH,

Of Counsel





## APPENDIX 'A'

16

### COPYRIGHT LAW OF THE UNITED STATES

- § 112. Injunctions; service and enforcement.
- § 113. Transmission of certified copies of papers for enforcement of injunction by other court.
- § 114. Review of orders, judgments, or decrees.
- § 115. Limitations.
- § 116. Costs; attorney's fees.

§ 101. INFRINGEMENT.—If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) INJUNCTION.—To an injunction restraining such infringement;

(b) DAMAGES AND PROFITS; AMOUNT; OTHER REMEDIES.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of \$200 nor be less than the sum of \$50, and in the case of the infringement of an undramatized or non-dramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of \$100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of \$5,000 nor be less than \$250, and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, \$10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, \$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, \$50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, \$100 for the first and \$50 for every subsequent infringing performance; in the case of other musical compositions \$10 for every infringing performance;

(c) IMPOUNDING DURING ACTION.—To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) DESTRUCTION OF INFRINGING COPIES AND PLATES.—To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

(e)<sup>1</sup> INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice.

[ (f) See footnote 1, page 15, *supra*. ]

[ § 102. See footnote 1, page 15, *supra*. ]

[ § 103. See footnote 1, page 15, *supra*. ]

<sup>1</sup> The former section 101(e) was deleted in its entirety and the present language was substituted by the Act of October 15, 1971, Pub. L. 92-140, 85 Stat. 391, effective immediately upon enactment.



## APPENDIX 'B'

FILED

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JUN 20 4 55 PM '72

JOSEPH NO. 71-1772-Civ-JLK  
CLERK, U.S. DIST. CT.  
SOUTHERN DIST. OF FLA.THE ROBERT STIGWOOD GROUP :  
LIMITED, et al., :

Plaintiffs, :

vs. :

MIAMI JAI-ALAI, INC., et al., :

Defendants. :

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND FINAL JUDGMENT

This cause came on for final hearing set by Order of this Court dated March 2, 1972, the time therefor being reset by notice for April 5, 1972, at 10:00 a.m., pursuant to the Court's instructions. The Defendants failed to appear personally by counsel or otherwise at the final hearing, but the Plaintiffs appeared by counsel and presented evidence and submitted a memorandum of law on the remaining issues before the Court. Having considered the prior proceedings in this case, the evidence submitted and the Plaintiffs' memorandum of law, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiff Leeds Music Limited is the proprietor of valid and subsisting United States statutory copyrights in and to the copyrights in the following musical works, the subject matter of the certificates of registration thereof, dated and identified as follows:

- (1) "Superstar (From the Rock Opera 'Jesus Christ')"  
Dec. 5, 1969, Class E, No. Eu 151211;
- (2) "John Nineteen Forty-One (From the Rock Opera  
'Jesus Christ')"  
Dec. 5, 1969, Class E, No. Eu 151212;
- (3) "I Don't Know How to Love Him (From the Rock Opera  
'Jesus Christ')"  
Oct. 30, 1970, Class E, No. Eu 219295;
- (4) "Jesus Christ Superstar, A Rock Opera (Musical Excerpts  
Complete Libretto)"  
Dec. 21, 1970, Class D, No. Dp 7613;
- (5) "Jesus Christ, Superstar, A Rock Opera (Libretto)"  
Feb. 24, 1971, Class D, No. Df 2066 (Additional Words);
- (6) "Jesus Christ Superstar (Vocal Score)"  
April 20, 1971,  
Class D, No. Du 79703.

Each of those registered copyrights are in full force and effect.

2. The Plaintiff Leeds Music Corporation is possessed of the rights under said copyrights for the United States, except the professional stage rights which are possessed by Plaintiff The Robert Stigwood Group Limited.

3. The Plaintiff MCA Records, Inc. is the proprietor of a valid and subsisting United States statutory copyright in the label comprehending a double angel symbol, the subject matter of the certificate of registration thereof, dated and identified as follows: "Class K, Reg. No. KK 220213, Apr. 20, 1971."

4. Defendants Hayes and Anastasio have done business as the "Jesus Christ Superstar Company" and "The National Touring Company," and said Defendants have presented 17 public performances of "Jesus Christ Superstar, A Rock Opera," each performance comprehending uses of the said five copyrighted musical works of Plaintiff Leeds Music Limited, performed in the original sequence of the Opera, the sixth copyrighted musical titled "John Nineteen Forty-One" not being utilized therein; and each of such performances was without authorization from Plaintiffs herein.



5. Defendants presented 17 unauthorized performances of "Jesus Christ Superstar" as described above on the following dates at the following locations, resulting in the following gross profits to Defendants:

PERFORMANCES -- JESUS CHRIST SUPERSTAR

<u>Date</u>	<u>Place</u>	<u>Defendants' Receipts</u>
November 18, 1971	Tampa, Florida	\$ 1,920.00
November 19, 1971	Jacksonville, Florida	2,130.00
	Deposit Florida	5,000.00
November 26, 1971	Roanoke, Virginia	4,131.44
November 28, 1971	Richmond, Indiana	5,772.00
November 30, 1971	Mobile, Alabama	1,105.04
December 1, 1971	New Orleans, Louisiana	9,554.98
December 2, 1971	Baton Rouge, Louisiana	2,671.47
December 3, 1971	Jackson, Mississippi	8,410.69
December 4, 1971	Shreveport, Louisiana	565.94
December 5, 1971	Little Rock, Arkansas	5,499.30
December 8, 1971	Louisville, Kentucky	774.42
December 9, 1971	Terra Haute, Indiana	946.78
December 12, 1971	Indianapolis, Indiana	-----
	TOTAL	\$48,482.06

Defendants received gross receipts from the performances in the total amount of \$48,482.06 as aforesaid. The said presentations at New Orleans, Little Rock Terra Haute and Indianapolis each consisted of two performances, all other presentations comprehending single performances.

6. Each of the aforesaid performances comprehended use of said five separate copyrighted musical works of Plaintiff Leeds Music Limited and an interference with the rights of Leeds Music Corporation and The Robert Stigwood Group Limited under said copyrights.

7. For purposes of use in connection with each of the aforesaid performances, the Defendants printed programs, each of which contained for separate reproductions of the double angel symbol contained in Plaintiff MCA Records, Inc.'s copyrighted label. A total of 10,000 copies of such programs were printed for Defendants, and a number of copies thereof were sold to the public at each of the aforesaid performances.

8. Defendants also utilized the double angel symbol in the preparation of printed advertising for their performances. Printed advertisements using the double angel symbol without the authorization of MCA Records, Inc. appeared in separate newspapers circulated at the following locations and in the following number of editions:

<u>Location</u>	<u>Number of Editions</u>
Fort Lauderdale, Florida	1
Miami, Florida	1
Jacksonville, Florida	1
Roanoke, Virginia	1
Richmond, Indiana	1
Mobile, Alabama	2
New Orleans, Louisiana	4
Baton Rouge, Louisiana	1
Shreveport, Louisiana	1
Louisville, Kentucky	3
Terra Haute, Indiana	4
Indianapolis, Indiana	10
Peoria, Illinois	2
Evansville, Indiana	7
	<hr/>
TOTAL	39

Defendants utilized the MCA Records, Inc.'s copyrighted label as aforesaid in a total of 39 separate editions of newspaper advertising.

9. Plaintiffs offered no evidence of actual damages arising from the infringing acts of Defendants.



10. The Plaintiffs collectively herein actually incurred legal fees and costs in prosecuting this action against the Defendants in the total amount of \$4,435.94.

#### CONCLUSIONS OF LAW

1. The Plaintiff Leeds Music Limited is the proprietor of five separate valid and subsisting United States copyrights in the musical works which were separately infringed by Defendants at each of their aforesaid 17 public performances.

2. The Plaintiffs Leeds Music Corporation and The Robert Stigwood Group Limited are possessed of rights under the said United States copyrights of Plaintiff Leeds Music Limited which were interfered with by Defendants through their aforesaid 17 public performances.

3. Defendants are jointly and severally liable to Plaintiffs The Robert Stigwood Group Limited, Leeds Music Corporation, and Leeds Music Limited for profits derived from their uses of said copyrighted musical works in the infringing public performances in the total amount of \$48,482.06, representing Defendants' profits, as provided in §101(b) of the Copyright Act [17 U.S.C., §101(b)].

4. In addition to such profits Defendants are jointly and severally liable to Plaintiffs The Robert Stigwood Group Limited, Leeds Music Limited and Leeds Music Corporation for minimum statutory damages in the total amount

of \$21,250, arising out of the infringement of each of said five copyrighted musical works at each of Defendants' 17 public performances, as provided in §101(b) of the Copyright Act [17 U.S.C., §101(b)], representing \$250 for the infringement of each copyrighted musical work at each public performance.

5. The Plaintiff MCA Records, Inc. is the proprietor of the valid and subsisting copyright in the label comprehending the double angel symbol, and Defendants infringed said copyright by printing 10,000 copies of Defendants' program utilizing the double angel symbol.

6. Defendants are jointly and severally liable to Plaintiff MCA Records, Inc. for statutory damages in the total amount of \$10,000 for the infringement of the copyrighted label by the printing of 10,000 copies of Defendants' program, computed at the rate of \$1.00 for every infringing copy printed, pursuant to §101(b) of the Copyright Act [17 U.S.C., §101(b)].

7. The sales of Defendants' program at each of their 17 public performances were a further infringing act for which Defendants are jointly and severally liable to Plaintiff MCA Records, Inc. for statutory damages in the total amount of \$4,250, computed at the rate of \$250 with respect to the sales at each of the 17 public performances, pursuant to §101(b) of the Copyright Act [17 U.S.C., §101(b)].

8. Defendants are jointly and severally liable to Plaintiff MCA Records, Inc. in the amount of \$9,750 for the infringements of Plaintiffs' copyrighted label by the printing of newspaper advertising, computed at the rate of \$250 for the publication of each infringing newspaper edition, pursuant to §101(b) of the Copyright Act [17 U.S.C., §101(b)].



9. The Plaintiffs collectively are entitled to an award for their costs together with a reasonable attorney's fee for the prosecution of this action, pursuant to §116 of the Copyright Act [17 U.S.C., §116].

10. Defendants are liable to deliver up to Plaintiffs on oath for destruction all copies of the copyrighted works in suit in their possession or control, including programs and advertising mats, pursuant to the provisions of §101(d) of the Copyright Act [17 U.S.C., §101(d)].

#### FINAL JUDGMENT

Based upon the foregoing Findings of Fact and Conclusions of Law and the Court's Order granting motion for judgment by default dated March 2, 1972, it is hereby:

#### ORDERED, ADJUDGED and DECREED:

1. The permanent injunctions entered by the Court on November 30, 1971, and March 2, 1972, shall be continued as permanent final injunctions.

2. The Plaintiffs The Robert Stigwood Group Limited, Leeds Music Limited and Leeds Music Corporation shall be and are hereby awarded damages against the Defendants Larry Hayes a/k/a John Hayes and Carmine Anastasio, jointly and severally, in the amount of \$69,732.06, for which let execution issue.

3. The Plaintiff MCA Records, Inc. shall be and is hereby awarded damages against the Defendants Larry Hayes a/k/a John Hayes and Carmine Anastasio, jointly and severally, in the amount of \$24,000, for which let execution issue.

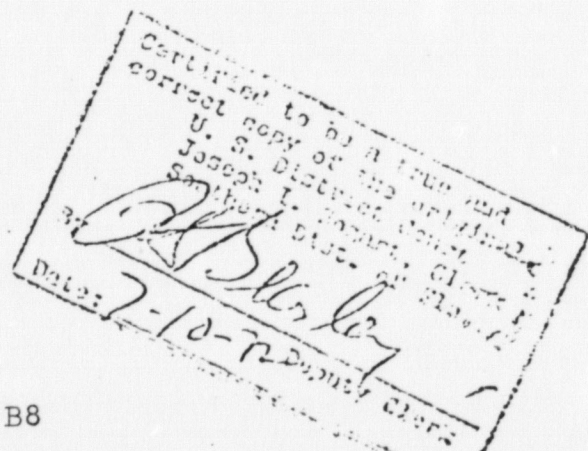
4. The Plaintiffs the Robert Stigwood Group Limited, Leeds Music Limited, Leeds Music Corporation and MCA Records, Inc. are collectively awarded as costs and a reasonable attorney's fee for the prosecution of this action the amount of \$4,435.94, jointly and severally, against the Defendants Larry Hayes a/k/a John Hayes and Carmine Anastasio, for which let execution issue.

5. Pursuant to the provisions of 17 U.S.C., §101(d), the Defendants Larry Hayes a/k/a John Hayes and Carmine Anastasio are hereby ordered to deliver up to the Plaintiffs on oath for destruction all copies of the copyrighted works in suit in their possession or control, including programs and advertising mats.

ORDERED at Miami, Florida, this 30<sup>th</sup> day of June, 1972.

1st JAMES LAWRENCE KING  
UNITED STATES DISTRICT JUDGE

cc: William J. Dunaj, Esq.  
Winfield E. Kinney III, Esq.





In the  
United States Court of Appeals  
For The Second Circuit

75-7076-7

The Robert Stigwood Group Limited, et al.,  
Plaintiffs-Appellants, Cross-Appellees,  
v.  
John T. O'Reilly, Jack Coyne and Robert Cassidy,  
Defendants-Appellees, Cross-Appellants.

Track Music, Inc., Fabulous Music Ltd. and New Ikon, Ltd.,  
Plaintiffs-Appellants, Cross-Appellees,  
v.

Contemporary Mission, Inc., John T. O'Reilly, Jack Coyne,  
Patrick Berkey, Richard Palmese, Joe De Vito, and  
Dorothy Lerner,  
Defendants-Appellees, Cross-Appellants.

**AFFIDAVIT  
OF SERVICE  
BY MAIL**

STATE OF NEW YORK,  
COUNTY OF NEW YORK, ss.:

Charles Esposito, being duly sworn, deposes and says that he  
is over the age of 18 years, is not a party to the action, and resides  
at 12 State Street, Valley Stream, New York.  
That on April 17, 1975, he served 2 copies of  
Brief and Appendix  
on

William D. O'Reilly, Esq.,  
52 Sharon Road,  
Windham, New Hampshire, 03087

by depositing the same, properly enclosed in a securely-sealed,  
post-paid wrapper, in a Branch Post Office regularly maintained by  
the United States Government at 350 Canal Street, Borough of Manhattan,  
City of New York, addressed as above shown.

Sworn to before me this  
17th day of April, 1975

*John V. Desposito*  
JOHN V. DESPOSITO  
Notary Public, State of New York  
No. 30-0592300  
Qualified in Nassau County  
Commission Expires March 30, 1977